

187-14

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-201541

DATE: June 2, 1981

MATTER OF: Skyways, Inc.

**DIGEST:**

1. Sound procurement policy requires that agencies document basis for evaluation of proposals in sufficient detail to show that judgment is reasonable and consistent with evaluation criteria. In instant matter, GAO concludes that agency's procurement review board report, contracting officer's determination, and report responsive to protest are sufficiently detailed to determine whether contractor selection was reasonably based and consistent with evaluation criteria.
2. Protester contends that agency's rating of management aspects of two proposals as essentially equal was arbitrary because awardee had no corporate management experience and awardee proposed marginal safety equipment. Contention is without merit because there was no specific requirement for minimum corporate experience and offerors were merely required to convince agency that scope of work was understood and could be performed; in view of subjective nature of proposal evaluation and agency's response to contention, GAO has no basis to conclude that evaluation of management was arbitrary.
3. Contention--that agency changed selection criteria from RFP's disclosed criteria where management was more important than cost/price to one where low cost/price

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was determinative--is without merit. Since GAO has no basis to question evaluation of management, which agency rated as essentially equal, agency properly made selection determination based on remaining evaluation criterion, cost/price.

4. Contention that agency was misled by awardee's proposal is without merit since (1) agency denies being misled, (2) awardee adequately refutes each element of protester's contention, and (3) agency is thoroughly familiar with capabilities required to perform work and agency had adequate information in awardee's proposal to properly assess awardee's capabilities.
5. Protest filed on December 16, 1980, alleging that changed insurance requirement favored other potential offerors and prejudiced protester is untimely under 4 C.F.R. § 20.2(b)(2) (1980) since basis of protest was known or should have been known on November 17, 1980.
6. Specific contention first raised in submission dated February 24, 1981, is untimely under 4 C.F.R. § 20.2(b)(2) (1980) since, to be timely, basis of protest should have been raised (at latest) in December 22, 1980, submission.
7. Protest--that (1) agency should have amended RFP instead of issuing letters of clarification, (2) letters of clarification conflict with RFP provisions, and (3) agency should not have permitted insurance with deductible plus certificate assuming responsibility for deductible in lieu of insurance without deductible--is untimely under 4 C.F.R. § 20.2(b)(1) (1980) since protest is

against alleged improprieties apparent in RFP and it was not filed prior to closing date for best and final offers.

8. Protest concerning awardee's financial capability to perform contractual commitment is against agency's affirmative determination of responsibility which is not reviewed by GAO since it does not concern definitive responsibility criteria and fraud or bad faith has not been suggested.

Skyways, Inc., protests the award of a contract to Fenix Corporation under request for proposals (RFP) No. N00019-81-R-0002 issued by the Navy for ferry flight services of certain aircraft from Ohio to Morocco.

The Navy determined that the Skyways and Fenix proposals were essentially equal regarding the management evaluation criterion, so the Navy selected Fenix for award because Fenix submitted the low evaluated cost/price proposal, and cost/price was the only other evaluation criterion. Skyways essentially contends that: (1) the management aspect of the two proposals was not equal, the Navy failed to credit Skyways with superior management experience, the Navy failed to observe the RFP's contractor selection criteria, and the Navy was misled by misstatements in Fenix's proposal; and (2) the Navy improperly relaxed certain insurance requirements to Skyways' detriment and misled Skyways on the importance of insurance without a deductible. We find that certain bases of protest were presented too late for our consideration and the other bases of protest are without merit.

The RFP notified offerors that the source selection would be made based on the proposal deemed to offer the greatest value to the Government in accord with two specific criteria: management and cost/price. The RFP advised offerors that management was the more important factor "although there is not a great disparity between them"; management was defined as the extent of the offeror's capability or ability to obtain

the capability (facilities and personnel) to deliver six OV-10A aircraft to Morocco; cost/price was defined as the total price/cost proposal based on a firm fixed price to ferry six aircraft plus fixed rates for maintenance delays and flight testing, if required. Offerors were warned that a proposal meeting minimum requirements with the low price might not be chosen for award if a higher priced proposal afforded the Government greater overall benefit due to superiority in the management area.

Following Navy selection procedures for less-than-major competitive acquisitions, a procurement review board evaluated the proposals and unanimously agreed that based on both technical qualifications and low price, Fenix should be awarded the contract. The Navy reports that both proposals reflected that the offerors understood the requirements and, after considering each proposal's strengths and weaknesses as presented in narrative summary by the technical evaluation team, the board and the contracting officer concluded that neither proposal's management aspects afforded the Government a greater overall benefit. Thus, Fenix's better cost/price proposal became the determining factor and award was made to Fenix.

#### Proposal Evaluation (Management)

First, Skyways argues that, contrary to the requirements of Defense Acquisition Regulation (DAR) § 2-407.8(a)(2) (1976 ed.) and several of our decisions, including Wadell Engineering Corporation, B-199171, October 10, 1980, 80-2 CPD 269, the record contains no justification supporting the Navy's decision to award to Fenix. Skyways notes that the only relevant documents in the record are the written summary of the board's recommendation and the contracting officer's determination, which, in Skyways' view, do not constitute adequate supporting documentation.

In response, the Navy reports that the Navy Instruction applicable to selection of contractors in less-than-major acquisitions merely requires a written synopsis of the matters considered and the recommendations by the board. In the Navy's view, this was done satisfactorily. Further, the Navy

argues that the Wadell Engineering decision involved an architect/engineering contract and a different section of the DAR and, therefore, it would not be relevant here. In sum, the Navy reports that neither proposal offered the Government a greater advantage from the management standpoint; thus, the determining factor properly became cost/price.

Our decision in Wadell Engineering concluded that agency evaluators must document the basis for evaluation and ranking of competing architect/engineering firms in sufficient detail to show that the judgments were reasonable and consistent with the evaluation criteria. Similarly, in National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401, which involved a competitive negotiated procurement, we were unable to conclude that the selection determination was reasonable because there was no documentation to provide a supporting rationale. In short, sound procurement policy requires that agencies document the basis for evaluation of proposals in sufficient detail to show that the judgment is reasonably based and consistent with the evaluation criteria.

Here, the record contains three relevant documents to support the Navy's selection determination: the board report, the contracting officer's determination, and the Navy's report on the protest. We believe that the Navy's selection rationale is sufficiently detailed so that we can review the determination to ascertain whether it was reasonable and consistent with the evaluation criteria.

Second, Skyways contends that the Navy was arbitrary in rating the management aspects of both proposals as essentially equal because (1) Skyways had management experience and Fenix had no experience with the management of aircraft ferry contracts, including functions such as route selection, maintenance support, message traffic, diplomatic clearances, and predeparture liaison, and (2) Fenix's proposal was based on marginal safety considerations and did not include the additional navigation and communication equipment proposed by Skyways.

In response, the Navy reports that Fenix proposed valid and practical solutions to all the requirements in the RFP, including specific management plans for (1) a third crew member to function as a navigator and relief pilot, (2) installation of additional navigation equipment with substantially the same capability as Skyways proposed, and (3) an onsite representative at the manufacturer's plant to handle certain equipment installation and inspection. The Navy viewed Fenix's proposal as completely demonstrating an understanding of the requirements and risks of the work.

In considering protests against a procuring agency's evaluation of proposals, we recognize that the relative desirability of proposals is largely subjective, primarily the responsibility of the procuring agency, and not subject to objection by our Office unless shown to be unreasonable, arbitrary, or violative of law. See, e.g., Moshman Associates, Inc., B-192008, January 16, 1979, 79-1 CPD 23. Here, we have reviewed Fenix's proposal, Skyways' arguments, and the Navy's responses, and we have no basis to question the Navy's determination that the management aspects of Skyways' proposal offered the Government no greater advantage over Fenix's proposal. There was no specific RFP requirement for minimum corporate experience; an offeror was merely required to convince the Navy that it knew and could do what had to be done. From that standpoint, we have no basis to disagree with the Navy's determination.

Third, Skyways contends that the Navy changed the basis of contractor selection from the one disclosed in the RFP--which indicated to Skyways that management excellence was more important than low price--to one which based an award to the offeror submitting the low priced, minimally acceptable proposal. The Navy denies that the nature of the contractor selection was different from the evaluation criteria disclosed in the RFP.

As noted, the RFP defined the management criterion as the extent of the offeror's capability or ability to obtain capability (facilities and personnel) to deliver the aircraft. The RFP provided that offerors

must demonstrate their understanding of the requirements and their ability to provide resources, technical competence, and management to successfully complete the work. Both offerors did what the RFP requested. We have no basis to conclude that the evaluation criteria were changed merely because the Navy rated the management aspects of both proposals as essentially equal. To the contrary, since there is no basis to question the Navy's evaluation of the management aspect of the proposals, the Navy properly made the selection determination based on the remaining evaluation criterion, cost/price.

Fourth, Skyways contends that Fenix misled the Navy by statements in its proposal regarding its management experience. The Navy reports that it was not misled. Fenix has provided a point-by-point refutation of each element of Skyways' contention. We are not persuaded by Skyways' argument because the Navy is thoroughly familiar with the capabilities required to accomplish the RFP's work and the Navy had adequate information in Fenix's proposal to properly assess Fenix's capability to do the work.

In sum, we have no basis to conclude that the Navy's evaluation of the management aspects of the proposals was unreasonable or arbitrary.

#### Proposal Evaluation (Cost/Price)

First, Skyways notes that the RFP initially required hull insurance without mentioning a deductible. On November 12, 1980, by letter, the Navy clarified the RFP requirement by stating that insurance without a deductible should be proposed. On November 17, 1980, Skyways received another letter from the contracting officer permitting insurance with a deductible if the offeror certified in its proposal that it would assume responsibility for making payment of the deductible amount at no increase in the contract price. Skyways' protest--first filed with our Office on December 16, 1980--contends that this change favored Fenix and prejudiced Skyways.

In response, the Navy explains that the change was made because Skyways suggested it; Fenix did not indicate a preference for a deductible.

This basis of protest was filed untimely; at the latest, under 4 C.F.R. § 20.2(b)(2) (1980), the matter should have been filed within 10 working days after Skyways first learned of the change, which it viewed as prejudicial to its interests and favorable to other offerors. In our view, Skyways needed no other information to form its basis of protest. Since it was not timely filed, we will not consider the merits of this issue. See Martin Marietta Corporation, B-198782, September 9, 1980, 80-2 CPD 185.

Second, Skyways contends--for the first time in a letter dated February 24, 1981--that on or about November 17, 1980, the contracting officer told Skyways that an offer based on insurance without a deductible would receive more favorable consideration in the evaluation for award than an offer based on insurance with a deductible amount. In reply, the Navy denies that the contracting officer made such a statement to Skyways.

In our view, this specific argument was also filed untimely; at the latest, the matter should have been raised in Skyways' initial protest submission. Since it was not, it will not be considered on the merits. See, e.g., CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225.

Third, Skyways argues that the Navy should have amended the RFP to state the Navy's specific insurance requirements instead of issuing letters of clarification.

Fourth, Skyways argues that the Navy's clarification letters conflict with the RFP's Ground and Flight Risk clause and the RFP's Indemnification and Assumption of Risk clause; moreover, because of that conflict, such a certificate would be unenforceable.

Fifth, Skyways argues that a proposal based on a combination of (1) insurance with a deductible

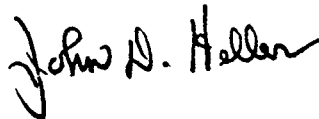


and (2) a certificate assuming responsibility for the deductible amount does not offer the Government the same degree of protection as insurance without a deductible amount.

The latter three arguments pertain to alleged improprieties in the RFP. Under 4 C.F.R. § 20.2(b)(1), such bases of protest must be filed prior to the applicable RFP closing date. Since Skyways did not raise these issues until after the closing date for receipt of best and final offers, the bases of protest are untimely and will not be considered. See Dynation Corporation, B-201342, December 10, 1980, 80-2 CPD 423.

Sixth, Skyways contends that the Navy should not have accepted Fenix's certificate that it would be responsible for any damage up to the deductible amount because Fenix is a corporation with no assets upon which the Government could proceed in the event that Fenix fails to honor the certificate. In our view, this contention relates to Fenix's ability to perform on its contractual commitment, which is a matter of responsibility. We do not review this type of contention since it does not concern definitive responsibility criteria and fraud or bad faith on the Navy's part has not been suggested. See, e.g., Fermont Division, Dynamics Corporation of America; Onan Corporation, B-195431, June 23, 1980, 80-1 CPD 438.

Accordingly, Skyways' protest is denied in part and dismissed in part.



Acting Comptroller General  
of the United States